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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of

Implementation of the Pay Telephone
Reclassification and Compensation Provisions
of the Telecommunications Act of 1996

96-128
CC Docket No. ~~90-314~~

To: The Commission

COMMENTS OF PAGEMART WIRELESS, INC.

PageMart Wireless, Inc. ("PageMart"), by its attorneys, hereby submits its Comments in response to the Commission's public notice in the above-captioned proceeding.^{1/}

PageMart is an innovative paging company that provides low-cost, nationwide services. PageMart subscribes to 800 and 888 numbers through contracts with interexchange carriers ("IXCs") and provides these numbers to its customers; the customer may then be paged without the calling party's incurring a long distance toll charge. As a reseller of IXC services, PageMart is directly affected by the authorization that the FCC gave to the IXCs to pass on to their customers, including paging providers, the costs incurred by IXCs for compensating payphone service providers ("PSPs") for 800/888 number calls.

^{1/} Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding (CC Docket No. 96-128), DA 97-1673 (August 5, 1997).

PageMart participated in the proceedings on reconsideration of the Commission's original payphone order.^{2/} Following the Commission's decision on reconsideration,^{3/} PageMart -- along with the Personal Communications Industry Association ("PCIA") and Paging Network, Inc. ("PageNet") -- filed petitions for review of the Commission's Payphone Orders with the U.S. Court of Appeals for the District of Columbia Circuit. The Court of Appeals consolidated these and other petitions for review in its recent decision in Illinois Public Telecommunications Ass'n v. FCC.^{4/}

The court's decision remanded to the Commission certain portions of the Payphone Orders. The Common Carrier Bureau asked interested parties to comment on a number of issues resulting from this remand. See note 1 supra. Below, PageMart respectfully requests that the Commission consider certain factors as it reevaluates the Payphone Orders on remand.^{5/}

^{2/} Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20451 (1996).

^{3/} Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd. 21233 (1996) (collectively, with the original order, the "Payphone Orders").

^{4/} 117 F.3d 555 (D.C. Cir. 1997).

^{5/} PageMart supports the motion recently filed by a number of IXCs, asking the D.C. Circuit to clarify that it did vacate the provisions of the Payphone Orders imposing an interim compensation plan, and alternatively asking that, if it did not do so, it should reconsider. See Motion for Clarification or, Alternatively, for Partial Rehearing of Cable & Wireless, Inc., the Competitive Telecommunications Ass'n, Excel Telecommunications, Inc., Frontier Corp., LCI International Telecom Corp., MCI Telecommunications Corp., Sprint Corp., Telco

**I. The Inability of the IXCs to Block 800 and 888 Calls
Undermines the Premise of a "Carrier Pays" System.**

PageMart, PCIA, and PageNet (collectively, the "Paging Petitioners") focused their brief seeking review of the Payphone Orders on the Commission's decision to require carriers, rather than callers, to pay PSPs for access code and subscriber 800/888 calls. Although the court, in its Illinois decision, rejected the Paging Petitioners' arguments, it did so based on a key factual assumption. In order to support this portion of the Commission's orders, the court relied upon the fact that carriers "have some leverage 'to negotiate for lower per-call compensation amounts,' in that they can block calls from particular payphones charging excessive rates."^{6/} Earlier in the opinion, the Court had found that "the FCC's assumption that the IXCs have the capacity to 'block' calls is reasonable."^{7/} It is clear that the Court recognized that the ability to block calls is a fundamental premise supporting the decision to use a "carrier pays" mechanism for its competitive market pricing system.

As it augments the record in this proceeding, the Commission should not lose sight of the fact that call-blocking technology is integral to the development of a competitive PSP market based on a "carrier pays" mechanism. As the Paging Petitioners explained in the D.C. Circuit, the "carrier pays" mechanism will not

^{5/}(...continued)

Communications Group, Inc., and WorldCom, Inc., No. 96-1394 (D.C. Cir., filed August 19, 1997).

^{6/} 117 F.3d at 567. "Given this explanation, the Commission's conclusion that a 'carrier pays' compensation system will result in competitive market pricing of 800 service payphone per-call compensation charges was not arbitrary and capricious." Id.

^{7/} Id. at 564.

promote competition in the absence of blocking technology. If the party that is supposed to incur the cost (the caller) does not have to pay the cost of an 800/888 number call that he or she dials from a payphone, he or she will not consider cost when initiating a call. If the IXC or the 800/888/888 service subscriber (in cases where costs are passed through) cannot decline calls, it will have no leverage to influence the cost of an 800/888 call. There will be no market force limiting the local toll cost of an 800/888 number call that is initiated at a payphone.

None of the IXCs currently has the technological capacity to provide 800/888 numbers with selective blocking of calls from payphones made to these numbers. Some IXCs have recognized that they cannot equitably pass through to paging carriers the costs they incur for PSP compensation until they are able to provide to these paging carriers an option to block calls from unduly expensive payphones. Other IXCs, however, have already begun to pass through the costs resulting from their payphone compensation obligations. Thus, 800/888 number subscribers, such as paging carriers, are faced with a bevy of new charges that they may be powerless to influence for the foreseeable future.

The Commission should not mine the record for information regarding market-based compensation and at the same time ignore the critical fact of blocking technology. Paging companies compose a large segment of the IXCs' 800/888 number subscribers. As market participants with limited resources, paging companies cannot afford to make an indefinite amount of payments into a system that -- even if it may have the potential to become a competitive market at some point in the future -- is far from being a competitive market at the present time.

II. **Retroactive Adjustment Would Be an Inequitable Solution for Paging Carriers.**

In its Public Notice, the Commission placed the industry on notice that, "should the equities so dictate, payphone compensation obligations (or the absence of such obligations) incurred by providers of interexchange services and compensation levels paid or received under our existing rules pending action on remand may be subject to retroactive adjustment in order to undo the effects of applying aspects of the current rules that were identified by the court as potentially arbitrary." By this statement, the Commission acknowledged that its interim compensation mechanism may well change, and that some retroactive adjustment may be necessary.

It is unclear why the Commission has chosen the IXC's, and more specifically their 800/888 number subscribers, to shoulder the burden of this potential change. If, as is likely on the basis of the Illinois decision and the record before the Commission, the interim compensation amount is determined to be much lower, 800/888 number subscribers (such as paging companies) may be entitled to a refund of sums that they have already paid and that were based on the erroneous interim compensation amounts specified in the Payphone Orders. Even if paging companies are able to wring compensatory refunds from two levels of payees with much greater market power -- the IXC's and the historically recalcitrant local exchange carriers ("LECs") -- the paging companies will already have suffered irreparable damage.

Paging is a low-priced service with relatively elastic demand. As the price of paging service has dropped to the \$6-8 dollar per month range, paging has become the lowest-priced telecommunications service, and demand for pagers has grown exponentially. Even a small rise in the price of monthly service, however,

would have a significant adverse impact on the demand for paging services. In short, if paging companies are forced to shoulder an unnecessarily large burden during an interim period, they will lose subscribers. A refund in the future would not bring these subscribers back.

The PSPs (primarily LECs) and the IXC's do not run a similar risk of losing subscribers on the basis of a cost adjustment. If they were to shoulder the interim burden of the uncertain cost estimates during the remand period, they would not be faced with irreparable damage to their subscriber base. Thus the Commission should require these entities, not paging carriers, to carry the interim risk of retroactive adjustment.

**III. At a Minimum, the Commission Should Consider the Impact of its
Remand Proceedings on the Business Plans of the Different Parties.**

Although PageMart adheres to its primary positions stated above regarding the "caller pays" system and the compensation burden during the remand proceedings, it recognizes the possibility that these positions may not be adopted by the Commission. PageMart suggests that, at a minimum, the Commission should recognize the burden of implementing its interim compensation system during the remand period, and consider extending the flat rate compensation scheme (\$46 per phone) that it had designated for the first year of the interim period. This system has the marked advantage of providing the industry with a fixed, clear approach, thereby facilitating business planning during this period of uncertainty.

IV. Conclusion.

In order to preserve equity and promote a competitive market for all telecommunications services, the Commission should take a comprehensive view of the issues that it is reevaluating in this proceeding, and consider carefully the call-blocking and retroactivity matters discussed above.

Respectfully submitted,

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